

**BEFORE THE OIL AND GAS CONSERVATION COMMISSION
OF THE STATE OF COLORADO**

IN THE MATTER OF THE APPLICATION OF) CAUSE NO. 1
CRESTONE RESOURCES OPERATING LLC FOR)
AN ORDER TO: 1) ESTABLISH AND APPROVE A)
RULE 216 COMPREHENSIVE DRILLING PLAN) DOCKET NO. 170500189
FOR SECTIONS 1, 2, 3, 10, 11 AND 12, TOWNSHIP)
1 NORTH, RANGE 69 WEST, 6TH P.M. AND)
SECTIONS 25, 26, 27, 34, 35 AND 36, TOWNSHIP) TYPE: GENERAL
2 NORTH, RANGE 69 WEST, 6TH P.M. FOR THE) ADMINISTRATIVE
COMPREHENSIVE DEVELOPMENT AND)
OPERATION OF THE CODELL AND NIOBRARA)
FORMATIONS, WATTENBERG FIELD, BOULDER)
COUNTY, COLORADO, AND (2) TO APPROVE A)
RULE 502.b. VARIANCE TO COMMISSION RULE)
303.)

BOULDER COUNTY’S COMMENTS TO SECOND DRAFT PRELIMINARY
COMPREHENSIVE DRILLING PLAN ELEMENTS

The following comments are submitted on behalf of Boulder County by County staff members. For ease of reference, staff submitting these comments will be referred to below as “the County.” However, these comments are not the result of a full review of any kind, including a review under the Boulder County Land Use Code (“the Code”) by the Board of County Commissioners, which will be required even if the CDP is approved by the COGCC. For purposes of the CDP process only, staff has compiled the following comments on Crestone Resources Operating LLC’s Second Draft Preliminary Comprehensive Plan Elements (“Second Draft”). The County reserves the right to supplement or amend them at any time.

The County is discouraged that the Second Draft contains no substantive changes as a result of the thoughtful, carefully prepared comments on the first draft provided at the public meetings and in writing by numerous private individuals, non-profit organizations and several governmental agencies, including the County. Crestone suggests that it might make changes, potentially significant ones, in the third and final draft, at which time there will be no further public meetings or opportunities for dialog and modifications to the plan. For example, if Crestone did move its proposed locations to cluster along Highway 52 in its Final CDP as it suggests, none of the people within a half mile of those sites will have had the opportunity to comment on those sites or to ask questions of Crestone at a public meeting. Unfortunately, Crestone has appeared not to take the CDP development process seriously from the beginning, particularly with regard to public input on site selection, so the failure to meaningfully

incorporate comments is not surprising. The flaws in Crestone's interpretation of the CDP process and its failure to make use of significant public input serve only to deepen the skepticism and mistrust of Crestone's stated commitment to an open and transparent process, and the COGCC process generally, in the Boulder County community. Nonetheless, the County submits the following comments as both the affected local government and an affected landowner.

Because Crestone made so few changes to the Second Draft, the vast majority of the County's comments submitted to the first draft still stands and is hereby incorporated by reference. The following are comments related solely to critical issues that were not corrected or were raised for the first time in the Second Draft.

I. Mineral Rights

With the CDP, Crestone seeks to make use of extraordinary rights granted to mineral owners and lessees under Colorado law to use lands belonging to others for heavy industrial uses, whether the owners consent or not. To develop the entire CDP area, Crestone will also have to pool minerals belonging to numerous people and entities, and may use the involuntary pooling procedure afforded under statute if such owners do not consent. As acknowledged by Crestone in the Second Draft at page 27, these rights to use the property of unwilling owners stem only from ownership of mineral interests, yet Crestone has refused to prove that it owns sufficient mineral rights to support the activities it proposes.

The County has repeatedly requested that Crestone provide proof of its right to extract minerals from at least its six proposed sites. Because no proof has been provided, the County has asked the COGCC to require Crestone to do so. Crestone's response in the Second Draft is that the County can search property records for itself. Crestone does not cite any authority for the proposition that a burdened landowner must expend its own resources to seek proof that Crestone owns the rights it claims to own. The County can easily produce proof that it owns the surface interest in its open space properties, which proof should be sufficient to exclude anyone who lacks proof of their right to enter from trespassing on County-owned land. Crestone says that its signature on its COGCC applications as "owner" should be sufficient proof to allow it to occupy and effectively destroy almost 100 acres of land purposefully protected for its important resource values. However, Crestone fails to cite any authority indicating that such "proof" would be admissible evidence of ownership in any venue. Crestone goes on to identify four documents as examples of leasehold interests underlying open space lands. If these are the types of documents that Crestone intends to rely on as proof of ownership, then Crestone's ability to prove ownership is insufficient. One of the documents (Recording No. 01672582) is impossible to tie to a particular parcel, and none of the documents lists Crestone as owner or lessee. Crestone resists providing actual proof of its mineral ownership in part because it says it is a difficult and complex task, yet it also says the County (and presumably the affected individual landowners in the CDP area) should go find it for themselves. Crestone, not Boulder County, is

the applicant proposing to drill in the CDP area, and thus it is Crestone's, not the County's, obligation to come forward with proof that it is entitled to the rights it seeks from the COGCC.

Crestone cannot exercise its state law rights to use the property of others without proving that it has the right to do so and the COGCC cannot approve any application without such proof. To preserve all parties' resources, again the County contends that this issue should be resolved before the CDP process goes any further.

II. The County's position regarding its open space lands

Crestone states that its failure to relocate its proposed sites to the Highway 52 corridor, as virtually every commenter suggested, is related in part to the County's decision not to consult as landowner for use of open space properties until those sites have been permitted. This assertion is an attempt to blame the County for Crestone's failures and a misapprehension of both the County's structure and its political position.

The County has informed Crestone that it is premature to consult on the use of open space properties for oil and gas development because those sites have not been permitted by any regulatory body, including Boulder County, and the locations may still change. The County reserved its right to be consulted at the appropriate time. Despite this lack of consultation, Crestone has proposed the use of four open space parcels in its first draft and again in the Second Draft, demonstrating that Crestone is able and willing to propose locations on County open space regardless of the County position on consultation.

Crestone asserts, at page 9, that "[i]f Boulder County Open Space would support the use of open space adjacent to Highway," then Crestone's analysis of those sites could go forward, implying that only then it might be able to respond to overwhelming public comment. This comment is misleading for two reasons. First, less than forty percent of the Highway 52 corridor is county-owned open space, and none of those open space parcels are on the north side of Highway 52. Thus, Crestone's "lack of consultation" explanation falls flat. Second, the Boulder County Parks and Open Space Department does not have the authority to support the use of county-owned land for oil and gas drilling. Despite Crestone listing it as a "local government within the CDP Application Lands" on page 13, along with the Boulder County Attorney and the Land Use Department ("Planning Department"), the Parks and Open Space Department is a division within the county government. The uses of open space property are determined by the Board of County Commissioners ("Board"). The Board cannot make a determination to support the use of open space for Crestone's development outside of the Special Use Review application process set forth in the Boulder County Land Use Code. The support Crestone accuses the Parks and Open Space Department of withholding is impossible and, as demonstrated by its repeated proposal of four open space sites without landowner consultation, not necessary at this stage of CDP development.

Finally, Crestone dismisses the County's long and thorough identification of deficiencies in the first draft by saying, at page 28 of the Second Draft, that the County's comments "stem[] from the fact that Crestone has not voluntarily placed Boulder County's permitting process first, over the Commission's primacy authority." Notably, Crestone fails to back up this comment with evidence of such a motive, making the response little more than a gratuitous editorial. The County disputes the implication that its comments to the first draft were some sort of retaliation for Crestone's procedural choices. Like all the other commenters to the first draft, the County put significant time into preparing its remarks and is disappointed that most were ignored and also classified as retaliation.

III. Phase I Report

Significant portions of the Second Draft, like the first, rely on information received from Crestone's "wildlife consultant." The report of that consultant was not included in the first but was attached to the Second Draft. The County has serious concerns with the report for a wide variety of reasons. As communicated to the COGCC on November 29 when the County sought clarification, the report has no author's attribution and lists no author's credentials, which harms its credibility immediately. Moreover, the text contains numerous flaws, inconsistencies and repeated failures to use the best available information, some of which are noted here.

- The report focuses only on the sites of the proposed well pads rather than the whole CDP area, giving limited information and failing to support comprehensive planning.
- The report failed to examine county wetland maps and CPW riparian maps.
- Section 6 states that no proposed facilities impact CPW resources of concern although the next page, and Figure 5, correctly note that the Section 1 pad is within or directly adjacent to mapped Bald Eagle winter concentration habitat. Moreover, the County has already provided information that the Section 35 pad is adjacent to a known Bald Eagle nest and winter roosts.
- Section 6.1 is incorrect that particular sensitive species do not have habitat near the proposed well pads; terns and plovers have historically inhabited the area, which contains ideal forage habitat.
- Section 6.2 incorrectly states that Bald Eagles, Burrowing Owl, Black-tailed Prairie Dog and River Otter "do not have habitat at or near" the proposed locations, while eagles are well known near two proposed pads and habitat is good for the other species in affected portions of the CDP.
- Section 6.3 ignores Critical Wildlife Habitat adjacent to the Section 35 pad.
- The report failed to consult the 2016 Breeding Bird Atlas.
- Section 6.4 ignores the Bald Eagle nest shown in Figure 5.
- Section 6.5 further ignores the Bald Eagle nest adjacent to the Section 35 pad.
- The report ignores the sensitive plant species in CPW Rare Plant Appendix pointed out by the County in its first set of comments.

- The 11 conclusion that the proposed sites are the “best sites within the CDP” is wholly unsubstantiated when the report, by its own terms, did not analyze any other sites or the area as a whole; moreover, the analysis ignores the proposed pipelines.
- Table 1 is incorrect, as there is appropriate habitat for at least terns and plovers.
- Table 2 ignores the potential for occurrence of (at least) American bittern, golden eagle, lark bunting, Lewis’s woodpecker, loggerhead shrike, long-billed curlew, mountain plover, peregrine falcon, prairie falcon, red-headed woodpecker and western grebe.
- Table 3 also ignores potential occurrence for the species noted above, with the addition of ferruginous hawk, western snowy plover and swift fox. Moreover Table 3 ignores numerous Boulder County Species of Concern including chorus frog, tiger salamander, American avocet, yellow-headed blackbird, indigo and lazuli buntings, wood duck, grate egret, northern flicker, eared grebe, northern harrier, rough-legged hawk, black-crowned night heron, belted kingfisher, horned lark, northern mockingbird, long-eared owl, Brewer’s, Cassin’s and grasshopper sparrows, cedar waxwing, American badger, 11 different bat species, American mink, lined and milk snakes, 13-lined ground squirrel, and short-horned lizard.
- Figure 3 leaves out several water bodies.
- Figure 4 inaccurately uses outdated information to depict the Critical Wildlife Habitat at Panama Reservoir by separating it in two pieces, leading to incorrect conclusions about pad proximity to wildlife habitat.
- Figure 4 leaves out the Kenosha Wetland Critical Wildlife Habitat (through which a proposed flowline runs).
- Figure 5 correctly reflects the updated Bald Eagle nest location, but the RSO map at Attachment D does not.
- Surveys will be needed for all listed species at the time of construction due to changes in breeding and foraging patterns.

In addition to the deficiencies in the Phase I report, the County has asked COGCC for copies of the input from CPW referenced by Crestone (p.9). Without the ability to review the actual information received, commenters cannot adequately assess the sufficiency of the information Crestone is relying on.

IV. Floodplain identification

Crestone did not understand or did not make use of the floodplain information provided by the County, responding that it will review the issue with respect to the applicable FEMA designations. The County was indicating that there is additional ‘Best Available Information’ (BAI) beyond the FEMA effective maps and that prudent well siting would be based on that BAI. Crestone has more than once requested that the County participate in the CDP process to a

greater degree than it has, so it is discouraging to see that the information provided from the County's expertise has been ignored.

V. Seismic testing

After the first draft, the County commented that Crestone was proposing to begin seismic testing in January 2018, without identifying clearly where that testing would occur and how long it would take. The Second Draft made no changes. The County contacted Crestone for clarification and received information from Crestone's counsel. For the benefit of the stakeholders and the COGCC, the County is attaching that explanation, which the County views as a supplement to the Second Draft. The County intends to pursue remaining questions on seismic testing plans, including Crestone's right to conduct seismic testing on surface lands without the permission of the surface owner if Crestone can prove it owns a mineral interest in the land.

VI. Identification of variances

In its CDP Plan Elements document, the COGCC required Crestone to "identify any rule variances to be incorporated and all of the requirements for granting variances" at this preliminary stage. The caption of Crestone's application asks the COGCC, in part, "to approve a rule 502.b. variance to Commission Rule 303." Yet, in the first draft, Crestone twice stated "[d]ue to the nature of this CDP proposal, at this time Crestone cannot confirm any known or anticipated variances for the CDP Area." In its comments on the first draft, the County noted that Crestone had not identified the variances it requested in the caption of its application and identified as "foreseeable" in the text.

Without making any change in the text in the Second Draft, Crestone says in response to the County's comment that it "has identified variances that may be necessary." The County finds no such identification anywhere in the Second Draft. This issue is important because, in both drafts, Crestone says it "can reasonably foresee that it may have variance requests related to: (a) Commission Rule 303.a., 303.b., and 303.g, (b) the Commission's 1000 series rules, and (c) other applicable rules." In other words, Crestone may be requesting variances to three pages of Form 2 requirements, almost four pages of Form 2A requirements, permit expiration provisions, the entire 1000 series on reclamation—clearly a critical issue for the agriculturally and ecologically sensitive areas within the CDP—and any other COGCC rule. Yet, it refuses to identify any such variances. The scope of foreseeable variance requests is so broad that they could completely transform the CDP as proposed. Moreover, stakeholders can have no way to anticipate which of the listed COGCC rules will be applied at any stage of the process. Therefore, the variances Crestone clearly anticipates, and outright requests in its application caption, must be clearly identified before the CDP can be considered final.

At this stage, for the reasons cited here and in its previous set of comments, the County believes the CDP process needs to be put on hold until the serious deficiencies noted can be

resolved. The time has clearly been too short for Crestone to make use of the public comment it received, rendering the time and resources of the public and agencies irrelevant. Counsel for Crestone has insisted that the timeline for the CDP is not too compressed, but Crestone's Director of Environmental, Regulatory & Community Affairs has been quoted as saying that they did not have enough time to make substantive changes, which is evident from their Second Draft. There is not sufficient time going forward to rectify these issues and provide additional public outreach time in the proposed schedule. Until Crestone proves that it owns mineral interests under its proposed sites, identifies the rule variances it seeks and amends the plan in conformity with the best available information, the timeline should be paused. On that basis, the County requests that:

- The COGCC stay the remainder of the current CDP timeline until Crestone sufficiently proves it owns the mineral rights necessary to develop in the CDP area;
- Because there were no substantive changes in the Second Draft and Crestone suggested repeatedly that it may still make additional changes, the third draft as currently scheduled should be considered the second draft;
- The COGCC require Crestone to hold additional public, in-person stakeholder meetings after submission of its next draft and before any further steps in the process; and
- The COGCC require Crestone to clearly identify all variances that it intends to seek from COGCC rules in its next draft.

From: Jamie Jost
To: [Burke, Kate A.](#)
Cc: [Sanchez, Kimberly](#); [Hughes, David](#); [Pearlman, Ben](#); [Jason Oates](#)
Subject: Re: Crestone seismic study plans
Date: Friday, December 08, 2017 6:22:08 AM

Good morning Kate,

Please see below.

Jamie

1. The narrative gives a 15-month window for this but also says the study will take approximately 30 days to complete—can you clarify when the studies are planned to take place and how long they will last?

**Crestone anticipates initiating the seismic outreach and permitting with surface and mineral owners in late-spring early summer 2018 and completing the seismic surveys and seismic shoots in late 2018/early 2019. The seismic outreach and permitting portion of the project can take anywhere from 6-9 months and the actual seismic survey may take approximately 30-60 days. We provided for a 15 month window for flexibility given the sensitivities in the CDP area.

2. Is the described testing only for the proposed surface location parcels or a larger area?

**The seismic survey and shoot will be for the CDP area, if all appropriate permissions are obtained.

3. Does Crestone claim the right to do seismic studies on lands where it does not own the mineral rights? If so, how?

**Crestone will seek approval from other mineral rights owners to conduct seismic surveys over their minerals, or utilize other available avenues for access if necessary. We must obtain a 'mineral permit' covering every tract of land overlying the minerals. This will allow Crestone to record and process the data acquired during the survey for each mineral tract. This permission will be obtained by the mineral owner of said mineral tract. If the mineral interest has been leased, we will obtain a mineral permit from the lessee, instead of the mineral owner (lessor).

4. Please explain Crestone's process for gaining surface owner permission to do seismic work on any parcels.

**Permission must be granted by the surface owner, by way of a signed 'surface permit', to allow us physical access onto a tract of land if Crestone does not own the lease underlying the surface tract. During this process, a permit agent will meet with the surface owner to discuss the seismic operations and what to expect upon entry for the survey and shoot. They will also discuss concerns that the surface owner may have, and possibly add stipulations to the seismic permit to satisfy those concerns. Every surface owner within the project, where access is needed, will be met with individually by a team of agents.

Jamie L. Jost
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From: Kate Burke <kaburke@bouldercounty.org>
Date: Tuesday, December 5, 2017 at 1:16 PM
To: Jamie Jost <jjost@jostenergylaw.com>
Cc: "Sanchez, Kimberly" <ksanchez@bouldercounty.org>, "Hughes, David" <dhughes@bouldercounty.org>, "Pearlman, Ben" <bpearlman@bouldercounty.org>
Subject: RE: Crestone seismic study plans

Hi, Jamie, any answers to these questions? We are getting a lot of concern about seismic testing from residents who have read the CDP drafts and we need information ASAP.

From: Jamie Jost [<mailto:jjost@jostenergylaw.com>]
Sent: Wednesday, November 29, 2017 12:35 PM
To: Burke, Kate A.
Cc: Sanchez, Kimberly; Hughes, David; Pearlman, Ben
Subject: Re: Crestone seismic study plans

Thanks Kate. Let me get these over to Crestone and we will provide a response.

Jamie

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From: Kate Burke <kaburke@bouldercounty.org>
Date: Wednesday, November 29, 2017 at 12:20 PM
To: Jamie Jost <jjost@jostenergylaw.com>
Cc: "Sanchez, Kimberly" <ksanchez@bouldercounty.org>, "Hughes, David" <dhughes@bouldercounty.org>, "Pearlman, Ben" <bpearlman@bouldercounty.org>
Subject: Crestone seismic study plans

Jamie—we have questions about the seismic studies referenced in the CDP second draft. Your answers will help us formulate our comments.

1. The narrative gives a 15-month window for this but also says the study will take approximately 30 days to complete—can you clarify when the studies are planned to take place and how long they will last?
2. Is the described testing only for the proposed surface location parcels or a larger area?
3. Does Crestone claim the right to do seismic studies on lands where it does not own the mineral rights? If so, how?
4. Please explain Crestone's process for gaining surface owner permission to do seismic work on

any parcels.

Thanks,

Kate Burke

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